

REMARKS

Claims 17-47 are pending in this application.

In the Office Action dated June 28, 2005 (hereinafter the first Office Communication), the Examiner asserted that the application contains four patentably distinct species as represented by Figs. 2, 3, 4, and 5, respectively. The Examiner then required "an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon."

In the response filed July 15, 2005, Applicants elected the species of Figs. 5A, 5B, without traverse, for prosecution, and identified claims 17-47 as reading on Figs. 5A, 5B.

In the Office Communication dated October 5, 2005 (hereinafter the second Office Communication), the Examiner asserted that "Applicant has failed to properly elect from the Election of Species" and the "Applicant has failed to list claims that are only readable on the elected species." Applicants respectfully disagree. Applicants have elected Species IV (i.e., Fig. 5) and identified the claims that are readable on the elected species (i.e., claims 17-47). Therefore, the Examiner's assertions regarding the insufficiency of Applicants' initial response to the election requirement appears to be unsubstantiated.

Based upon the Examiner's comments in the second Office Communication, it appears that the Examiner is requiring an identification or association, by Applicants, of certain claims with certain figures and a subsequent election of a set of claims with a particular figure or grouping of figures. Such a requirement, however, is not supported by the M.P.E.P. Instead, this requirement by the Examiner appears to improperly shift, from the Examiner to Applicants, the initial burden of identifying claimed distinct or independent inventions.

Not only has the Examiner impermissibly attempted to shift the initial burden of identifying distinct or independent inventions in Applicants' application, the Examiner's statement of the restriction requirement fails to meet the requirements set forth in the M.P.E.P. As stated in M.P.E.P. § 803:

There are two criteria for a proper requirement for restriction between patentably distinct inventions:

- (A) The inventions must be independent ... or distinct as claimed ...; and
- (B) There would be a serious burden on the examiner if restriction is not required

As also stated in M.P.E.P. § 803, "[e]xaminers must provide reasons and/or examples to support conclusions." However, the Examiner has provided neither reasons nor examples to support the Examiner's conclusions. The Examiner is also referred to M.P.E.P. § 808, which states:

Every requirement to restrict has two aspects: (A) the reasons (as distinguished from the mere statement of conclusion) why each invention as claimed is either independent or distinct from the other(s); and (B) the reasons why there would be a serious burden on the examiner if restriction is not required, i.e., the reasons for insisting upon restriction therebetween as set forth in the following sections.

As explicitly noted in the above-reproduced paragraph, a statement of conclusion is different than the reasons why each invention, as claimed, is considered by the Examiner to be either independent or distinct from the other. These reasons, however, are not found in the restriction requirement in either the first Office Communication or the second Office Communication, as the Examiner's restriction requirement only contains a statement of conclusion. Furthermore, the Examiner has not established that there would be a serious burden on the Examiner if restriction is not required.

Applicants also note that the Examiner's restriction requirement fails to meets the requirements of M.P.E.P. § 814, which states, in part, the following:

The examiner must provide a clear and detailed record of the restriction requirement to provide a clear demarcation between restricted inventions so that it can be determined whether inventions claimed in a continuing application are consonant with the restriction requirement and therefore subject to the prohibition against double patenting rejections under 35 U.S.C. 121. (emphasis in original)

Applicants respectfully submit that the record of the restriction requirement is not "clear and detailed." In the first Office Communication, the Examiner has merely concluded, without any

accompanying reasoning, that Figs. 2-5 respectively disclose separate species. This does not constitute the "clear demarcation" required of a restriction requirement.

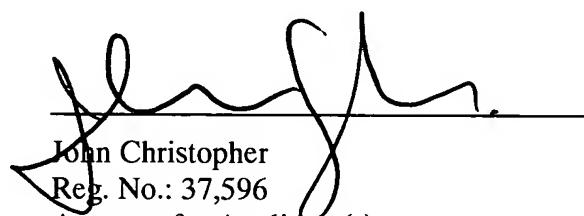
In second Office Communication, the Examiner is requiring an election between "the embodiments contained in figures 3-5 **AND** the embodiments contained in figures 6-8" (emphasis in original), which appears to be a different election requirement than that found in the first Office Communication. This second restriction requirement also fails to provide a clear and detailed record of the restriction requirement. Therefore, Applicants respectfully submit that the Examiner has not established a proper restriction requirement.

Notwithstanding that the Examiner has failed to meet the criteria for establishing a proper restriction requirement and presuming that the Examiner intended to set forth a different election requirement in the second Office Communication, Applicants elect the species of Figs. 5A, 5B (i.e., the species identified by the Examiner as "the embodiments contained in figures 3-5"), without traverse, for prosecution. Claims 17-47 read on Figs. 5A, 5B.

The Examiner is encouraged to telephone the undersigned to discuss any matter that would expedite allowance of the present application.

Respectfully submitted,

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